

*a***PUBLIC PROSECUTOR****v.****MOHD. NOOR ABDULLAH**

HIGH COURT MALAYA, ALOR SETAR

KC VOHRAH J

b

[CRIMINAL APPEAL NO. 42-25-90]

16 JANUARY 1992

EVIDENCE: *Corroboration - Girl aged 9 years 7 months - Whether any independent corroboration - Appeal by DPP against acquittal.*

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The respondent was charged at the Sessions Court, Alor Setar for an offence of rape of a girl 9 years 7 months at the material time in 1984. He was acquitted. Hence, this appeal by the DPP.

Held:

[1] The learned Sessions Judge was right in exercising her discretion by requiring corroboration of evidence that the complainant was raped.

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[2] The Court was in agreement with the obvious conclusion of the learned Sessions Judge that she could not find any independent corroboration of the testimony of the complainant that she had been raped.

[3] The appeal is therefore dismissed

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[Appeal against acquittal dismissed.]

Cases referred to:

Tham Kai Yan & Ors. v. PP [1977] 1 MLJ 174 (dist)

Loo Chuan Huat v. PP [1971] 2 MLJ 167 (cit)

Din v. PP [1964] 30 MLJ 300 (cit)

Chao Chong & Ors. v. PP [1960] MLJ 238 (cit)

*f***Legislation referred to:**

Evidence Act 1950, s. 133A

For the appellant - Tun Majid b. Tun Hamzah, DPP

For the respondent - Mayandi; M/s. Mayandi & Panjaram

JUDGMENT*g***KC Vohrah J:**

The respondent was charged in the Sessions Court, Alor Setar for an offence of the rape of a young girl aged 9 years 7 months, allegedly committed in 1984. The respondent Mohd. Noor bin Abudllah (hereinafter referred to as the accused) was arrested in 1989 and his trial concluded in 1991 with his acquittal.

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The Deputy Public Prosecutor on behalf of the public prosecutor in appealing against the order of acquittal attacked the learned Judge's decision that there was no independent corroboration of the fact of rape; he argued there was.

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The learned Judge made her decision after having reserved her judgment and it is clear from the grounds of her decision that she had carefully reviewed all available evidence. The sworn evidence as to rape was that of a young girl of some 14 years of age and not that of a child

of tender years but the girl was recalling events which allegedly took place when she was of tender years and unaware, on her admission, as to the nature of the act when it allegedly took place. I am aware of the case of *Tham Kai Yan & Ors. v. PP* [1977] 1 MLJ 174 that in the circumstances of that case there was no need for warnings regarding the incorporated sworn evidence of a 14 year old witness. It is obvious, however, that in the present case that the learned Judge rightly exercised her discretion in treating the evidence of this young witness with caution; she had warned herself of the rule of prudence that before an accused can be convicted on the sworn evidence of a child, the sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony. She must have had in mind *Loo Chuan Huat v. PP* [1971] 2 MLJ 167 at 169 so far as it relates to the sworn evidence of a child (insofar as the case deals with the unsworn evidence of a child, the matter is overtaken by s. 133A of the Evidence Act 1950 where there is now a requirement in law that the unsworn evidence of any child of tender years has to be corroborated by some other material particular in support implicating an accused before he can be convicted). And it is also quite clear that she warned herself of the desirability for corroboration of the evidence of a prosecutrix in a rape case (see *Din v. PP* [1964] 30 MLJ 300 at 302).

The sworn evidence of PW1 was this. On 30 August 1984 she was with her 3 younger siblings in the house after her mother went to the market. The accused came to her house and asked for paper and he then made paper boats to amuse her siblings. Later when she was in the kitchen, the accused came in and carried her to a room where he put her on a mattress and took off her clothes including her underwear. The accused took off his pants and underwear. He then held his male member and put it into her private part ("kemaluan"). She cried out and the accused closed her mouth and she pushed at the accused. She said she felt the accused's male member enter into her private part. She then got up and she felt the semen of the accused fall on the area of her stomach. The accused put on his clothes and ran away and she got up and put on her clothes.

PW1 said that her siblings saw the incident but they did nothing. She said she did not cry because she did not know what had taken place; she only realised that she had been raped after she had related the incident to one May Ajang and she was told by her that she had been raped. Neither her siblings nor May Ajang were called to give evidence but while PW1 did say at the trial that she had not disclosed about May Ajang either to her mother or to the police, May Ajang was never called by the prosecution although the prosecution had every opportunity to call her to testify at the continued hearing of the prosecution's case some 2 months later.

The evidence of the mother, PW7, was to say the least, coloured by her desire to implicate the accused as much as she could. At one stage of her evidence she said she saw the accused rape PW1 when she arrived at her house.

On the other hand she also said when she came back from the market she saw paper all over the house and that she questioned PW1 about it. PW1 cried and told her what had happened. PW7 then slapped PW1 on her thigh. When her brother (PW6) went there she told him of the incident. PW6, who said PW7 related the incident to him in the presence of PW1, stated that he lodged a police report regarding the incident that day. The police report shows that PW6 claimed that an incident had been related to him by his niece (PW1). There were many discrepancies between what was reported in that police report as having taken place between the accused and the girl and the evidence of PW1 but suffice it to say the report did not state that there was rape but that the accused took the girl to a bathroom and wet her private part and attempted to insert his male member into her private part.

- a** The police evidence was that the police went to the house of PW1 that night and took away the clothes of PW1 and the mattress. The chemist report produced at the trial showed that a pair of shorts and the mattress bore seminal stains.
- PW1 was examined that very night by a doctor who found fresh tears on her hymen. The doctor also found scratch marks probably made from finger nails in the area of the private part.
- b** At first the doctor said the tears were a result of a male member penetrating the vagina and she did not think it could have been caused by some other blunt object. But when she was recalled by Counsel (who was retained at a later stage of the trial by the accused), she said the tears could have been caused by any blunt object. She also said she did not find the presence of spermatozoa in her vagina.
- c** The accused denied having sex with the girl. He, however, admitted that he was in the house in the bathroom next to the kitchen and that he had masturbated himself there. He said he heard PW1 being beaten and he left the house. He worked as a lorry attendant and from the date he left the house till the date of his arrest he worked in Perak.
- d** While it is quite clear that the learned Judge did not quite believe the accused's story, she said that it was highly probable that the accused did something undesirable to the girl. But she felt that a reasonable doubt had been created in the prosecution's case that he raped her.
- e** Although PW1 said that she was raped this was in material contradiction to what was stated in the police report of PW6, the uncle of PW1, which was made the same day. PW6 had stated in evidence, as will be recalled, that his sister PW7 related to him what had happened to her daughter, PW1, that morning and that that was related in the presence of PW1. In that report, however, he stated that it was PW1 who related to him about the incident, that the accused took her to a bathroom, wet her private part and attempted to put his male member into her private part. PW7, on the other hand, said that the girl told her she was raped by the accused when she came home from the market but this piece of evidence is suspect when it is remembered that she even claimed at one stage that she saw the accused rape the girl when she arrived at her house. In the light of these it is not surprising that the learned Judge did not accept the opinion of the doctor that the girl was raped.
- f** In fact the doctor when recalled stated that a blunt object could have caused the tears in the hymen of the girl. The learned Judge was of the view that the girl at the time of the alleged incident did not know anything about sex and it was possible that May Ajang to whom she first told about the matter (and who was not called to give evidence by the prosecution) could have planted in her mind that she was raped.
- g** Although PW1 was some 14 years of age when she gave her sworn evidence the learned Judge was right in exercising her discretion by requiring corroboration of her evidence that she was raped having regard to the fact that the young girl was recalling events which allegedly took place some 5 years before when she was of tender years and to the fact that PW1 admitted that she did not know what had taken place.
- h** Clearly the learned Judge bore in mind the words of Thomson CJ (as he then was):
that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy
and also that:
- i** they find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination ...

(see the quotation she alluded to, appearing in *Chao Chong & Ors. v. PP* [1960] MLJ at 238 at 240).

I am in agreement with the obvious conclusion of the learned Judge that she could not find any independent corroboration of the testimony of PW1 that she had been raped. The appeal is therefore dismissed.

Also found at [1992] 1 CLJ 702

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